IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1976

NO. 75-6143

PINKNEY THOMAS MITCHELL, JR. AND WALLACE CHARLES LANFORD, JR., Petitioners

VS.

THE STATE OF NORTH CAROLINA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES, MOTION FOR LEAVE TO PROCEED IN ~~FORMA PAUPERIS~~

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IN THE

SUPREME COURT OF THE UNITED STATES

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NO. 75-6143

PINKNEY THOMAS MITCHELL, JR. AND
WALLACE CHARLES LANFORD, JR.,

Petitioners,

VS.

THE STATE OF NORTH CAROLINA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered in this Proceeding on October 7, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina was rendered and filed on October 7, 1975, bearing Opinion Number 7 and reported in 218 S.E. 2d 332. A copy of the opinion is hereto attached and made a part of this Petition.

JURISDICTION

The opinion of the Supreme Court of North Carolina above referred to was entered and certified in the Superior Court of Gaston County, North Carolina, on October 22, 1975, and an Order for Stay of Execution was entered on October 23, 1975, and executed by the Honorable Susie Sharp, Chief Justice of the Supreme Court of North Carolina. The Stay of Execution was granted pending the determination of this Petition for Writ of Certiorari to the United States Supreme Court.

That the time allowed by the Rules of the Supreme Court for the filing of this Writ has expired. However, the Rules promulgated by the Court can be waived by the Court, and thus

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attorneys for the Petitioners respectfully request the Court to waive that rule and allow this Petition. Attorneys had prepared a Petition for Extension of Time within which to file this Writ, but because the only date appearing on the opinion rendered by the North Carolina Supreme Court was the date on which the opinion was certified to the Superior Court, attorneys for the Petitioners miscalculated the ninety days they had with which to file this Writ of request for extension.

WHEREFORE, it is requested that the Court, in view of this, allow this Petition for Writ of Certiorari to be filed and be considered by the Court on its merits.

This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Have the Petitioners bean deprived of their constitutional rights to be free from the infliction of cruel and unusual punishments, in violation of the Eighth Amendment to the Constitution of the United States by virtue of their being sentenced to death under the North Carolina General Statutes 14-17 and 15-188?

2. Have the Petitioners been deprived of their constitutional right of due process of law, in violation of the Fifth Amendment of the Constitution of the United States by virtue of the consolidation for trial of the charges against Petitioner Wallace Charles Lanford, Jr., with those against Pinkney Thomas Mitchell, Jr.?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Eighth Amendment to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the

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militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

1. The North Carolina General Statutes 14-17 as amended, effective April 8, 1974:

Murder in the first and second degree defined; punishment,- A Murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree and shall be punished by imprisonment in the State's prison.

2. The North Carolina General Statutes 15-188:

Manner and place of execution. - The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State Penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendant of the State Penitentiary shall also cause to be provided in conformity with this Article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this Article.

3. The North Carolina General Statutes 15-152:

Separate counts; consolidation. - When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transaction of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated; Provided, that in such consolidating cases the defendant shall be taxed the solicitor's full fee for the

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> first count, and a half fee for only one subsequent count upon which conviction is had or plea of guilty entered; Provided, this section shall not be construed to reduce the punishment or penalty for such offense or offenses.

STATEMENT OF THE CASE

The petitioners, Pinkney Thomas Mitchell, Jr. and Wallace Charles Lanford, Jr., were tried before the Honorable William T. Grist and a jury at the October 21, 1974, Criminal Session of the Gaston County Superior Court Division of the General Court of Justice for the Twenty-Seventh Judicial District of North Carolina, upon indictments charging each of them with felonious burning of personal property and first degree murder of Kathleen Smiley, Both offenses occuring on or about the 21st. day of April, 1974. The petitioners, and each of them, entered a plea of not guilty of each charge. The District Attorney for the State moved that the cases be consolidated for trial as to each defendant and moved to try both defendants at the same time on the charges, which said motion was allowed over the objections of both Defendants. (R 75). The jury on the 21st. day of October, 1974, returned the verdicts of guilty in all four cases. The Court sentenced both defendants to death by the inhalation of lethal gas in the case against them charging them with first degree murder and imposed a judgment in the cases of felonious burning of personal property. Both defendants gave notice of appeal and the Supreme Court of North Carolina upheld the convictions. Both the State and one of the petitioners presented evidence in the case and the record of the trial consists of 289 pages.

The evidence presented by the State and by the petitioners is summarized in the attached Opinion handed down by the Supreme Court of the State of North Carolina on October 7, 1975. After the close of the evidence, guilty verdicts were returned against both petitioners. At that point the attorneys for both of the petitioners each made motions to set the verdicts aside and motions for mistrials. These motions were denied. Each defendant gave notice of appeal. (R 277, 279, 281).

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Both petitioners were tried in the Superior Court, and allowed to appeal to the Supreme Court of the State of North Carolina as indigents. The petitioners are still in an indigent state and respectfully move the Supreme Court of the United States to accept this Petition in that form, and in support of this the petitioners attach a written Motion pursuant to Rule 53 of the Supreme Court Rules.

The petitioners' convictions and death sentences were affirmed by the Supreme Court of the State of North Carolina in an Opinion filed on October 7, 1975.

REASONS FOR GRANTING WRIT

The petitioners contend that their constitutional rights to due process of law and freedom from the infliction of cruel and unusual punishments have been violated. The petitioners also contend that the proper resolution of the constitutional question is of importance to themselves in the case at hand and also to others who find themselves likely situated as being required to stand trial for capital offenses in the State of North Carolina. Subsequent to the Court's holding in Furman v. Georgia, 408 U.S. 238 the North Carolina General Assembly modified North Carolina General Statute 14-17, which prior to its modification read as follows:

> Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death; Provided, if at the time of rendering its verdict, in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's Prison and the Court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

The North Carolina General Assembly modified the above statute in the 1973 amendment inserting "kidnapping" in the first sentence and deleting, at the end of the first sentence, a former proviso authorizing the jury to recommend life imprisonment. The amendment

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also rewrote the second sentence so as to increase the maximum punishment for murder in the second degree from 30 years to life imprisonment. The 1973 amendatory act became effective April 8, 1974, and is applicable to all offenses thereafter committed, including the case at hand.

The petitioners contend that by reason of the modification of the statute by the North Carolina General Assembly after the decision in Furman the determination of whether the defendant should be subjected to a trial calling for a mandatory death penalty or whether the defendant should be tried for second degree murder carrying with it the lighter penalty of life imprisonment was left by the State to the discretion of the District Attorney calling the case for trial. Justice Douglas in the Furman case said as follows:

> In a Nation committed to Equal Protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, poor and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position....

The petitioners realize that Justice Douglas was referring to discretion in the application of punishment after conviction, but contend that the modifications of the North Carolina General Assembly from a practical point of view shifted the discretion from the jury to the office of the District Attorney, and that this shifting of discretion was accomplished by increasing the maximum penalty for second degree murder from 30 years to life imprisonment and by making mandatory the death penalty for the conviction of first degree murder. Petitioners say and contend that they and others in a like situation have been or are likely to be discriminated against by reason of their 'caste' or social and economic positions. The petitioners argue and contend that the mandatory death penalty and other modifications to North Carolina General Statute 14-17 are pregnant with discrimination, although it may appear to be non-discriminatory on its face.

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Petitioner Lanford says and contends that his right under the Fifth Amendment under the Consitution of the United States to due process of law was violated in that the trial court consolidated the cases for trial against the petitioners. Under Section 15-152 of the General Statutes of North Carolina, the consolidation for trial of two defendants charged with the same offenses is not expressly authorized, but unquestionably this statute has been interpreted many times to permit such consolidation. However, it has been repeatedly held that the matter of consolidation or severance is a discretionary matter for the Trial Court. State v. Dawson, 281 N.C. 645; 180 S.E. 2d 192 (1972). The North Carolina Courts have seemed to recognize the need for separate trials where the defenses of the defendants charged are antagonistic to each other. State v. Cotton, 218 N.C. 577; 12 S.E. 2d 246 (1940). The petitioners contend that in cases wherein the defendant is charged with an offense which carries with it a mandatory sentence of death that severance should be granted in all cases where fundamental fairness to the defendants, or either of them, requires severance. Petitioner Lanford contends that matters of convenience, time, and economics should give way to the right of a single defendant to have a case tried separately from a co-defendant if consolidation to any degree prejudices his right to a trial by a fair and impartial jury and that in those instances where the defenses of the defendants conflict, then in those cases, on objection by the defendants to consolidation, defendants contend the cases should be severed. In the instant case, on motion of the District Attorney for consolidation, both defendants objected. The defendant, Wallace Charles Lanford, Jr., was content to rely upon the weakness of the State's case and elected not to testify in his own defense. Pinkney Thomas Mitchell, Jr. testified to the effect that he did, in fact, kill Kathleen Smiley and apparently attempted to mitigate said killing and deny culpability in that he was under the influence of drugs and intoxicants at the time of the killing. That this admission and testimony on the part of Pinkney Thomas Mitchell, Jr. was unfair and prejudicial to the

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defendant, Wallace Charles Lanford, Jr. in that Pinkney Thomas Mitchell, Jr.'s defense was inconsistant with that of Wallace Charles Lanford's. That the testimony of the defendant, Pinkney Thomas Mitchell, Jr., coupled with the cumulative effect of the State's testimony as to the circumstances surrounding the killing of Kathleen Smiley made it impossible for a jury to consider impartially a plea of not guilty entered by the defendant, Wallace Charles Lanford, Jr. Petitioner Lanford contends that had he been tried separately, he probably would have been acquited and that the inconsistencies of the defenses of Pinkney Thomas Mitchell,Jr. and his own defense made a consolidation of the cases for trial prejudicial, resulting in his conviction of the offense of first degree murder, carrying with it a mandatory death penalty.

CONCLUSION

For the foregoing reasons, the petitioners pray that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

75-6143

PINKNEY THOMAS MITCHELL, JR. AND WALLACE CHARLES LANFORD, JR., Petitioners,	)	NO.
VS.	)	
THE STATE OF NORTH CAROLINA, Respondent.	)	

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE OF THE SUPREME COURT, GREETING:

NOW COMES Pinkney Thomas Mitchell, Jr. and Wallace Charles Lanford, Jr., through their attorneys, Robert H. Forbes and Robert E. Gaines, and respectfully move for leave to proceed in forma pauperis pursuant to Rule 53 of the Rules of the Supreme Court of the United States to petition the Supreme Court of the United States for a Writ of Certiorari to review the Judgment and Opinion of the Supreme Court of North Carolina on October 7, 1975, and in support of this Motion respectfully show unto the Court that they are presently prisioners in the State of North Carolina, have no means of income, and were found to be indigents in the trial and appeal of their case in North Carolina.

This the 28th day of January, 1976.

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JUDGMENT
SUPREME COURT OF NORTH CAROLINA

Fall TERM, 1975

STATE OF NORTH CAROLINA

vs.

PINKNEY THOMAS MITCHELL, JR. and
WALLACE CHARLES LANFORD, JR.

No. 7 Gaston County.

This cause came on to be argued upon the transcript of the record from the Superior Court Gaston *County:*

Upon consideration whereof, this Court is of opinion that there is no *error in the record and proceedings of said Superior Court.*

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the

Honorable J. WILLIAM COPELAND *Justice, be certified to the said Superior Court, to the intent that* ~~the~~ ~~XXX~~

PROCEEDINGS BE HAD THEREIN IN SAID CAUSE ACCORDING TO LAW AS DECLARED IN SAID OPINION

And it is considered and adjudged further, that the DEFENDANTS DO PAY

the costs of the appeal in this Court incurred, to wit, the sum of

****TWENTY-TWO AND 20/100**** *dollars ($* 22.20 *),*

and execution issue therefor. Certified to Superior Court this 22nd *day of* October *19* 75.

A TRUE COPY

ADRIAN J. NEWTON
Clerk of the Supreme Court.

By: *Deputy Clerk*

Commercial Printing Co., Raleigh, N. C.

IN THE SUPREME COURT OF NORTH CAROLINA FALL TERM 1975

STATE OF NORTH CAROLINA)
)
v) No. 7 - From Gaston
)
PINKNEY THOMAS MITCHELL,)
JR. and WALLACE CHARLES)
LANFORD, JR.)

Appeal by defendants from sentences of death imposed by Grist, J., 21 October 1974 Criminal Session of Gaston County Superior Court. Upon motion of each defendant, we certified for initial appellate review by this Court their appeals from the prison sentences imposed in the same trial upon their convictions of felonious burning of personal property.

Defendants were tried upon bills of indictment charging them with first-degree murder and felonious burning of personal property. The cases were consolidated for trial over objection of each defendant. Defendants entered pleas of not guilty to each charge and the jury returned a verdict of guilty on both charges.

The State's evidence tended to show the following: On 21 April 1974 Kathy Smiley and her twelve-year-old sister, Patricia, left their home in Atlanta to meet their father, F. Dale Smiley (who was separated from their mother), for breakfast at a restaurant about five miles away. Kathy drove a reddish-orange Volkswagen which belonged to her father. After breakfast, the father and Patricia left to go to Lake Lanier for boating. Kathy intended to go home to get her water skis and pick up her boyfriend before joining her father. The last time the father saw Kathy she was crossing I-85.

Kathy was seen walking down an access road near a Shell service station in Atlanta at about 10:15 a.m. The Volkswagen was parked close by with the blinker lights on. Between 10:00 a.m. and noon Kathy was seen at the Shell service station in the Volkswagen with both defendants. Nothing unusual occurred at that time.

On the same day, defendants and Kathy arrived in Gaston County in the Volkswagen. They picked up the witness Rafferty, who got in the back seat with Kathy. They drove into a wooded area and Mitchell said to Kathy, "This is it." Kathy was taken down into the woods and Mitchell had sexual relations with her while Lanford waited at the car. Then Lanford went down and had sexual relations with her. Afterwards they drove towards Crowder's Mountain and Rafferty got out of the car at a stop sign. The body of Kathy was found later at about 5:00 p.m. on the same day at the site of the old Lincoln Academy which is near Crowder's Mountain. She had been "gagged" with an electrical cord and her dead body tied to a tree. She had been stabbed many times in the neck, the heart, and other parts of the body.

The defendants were afterwards seen alone in the Volkswagen. Later that evening Lanford, in the presence of Mitchell, told his brother-in-law (Stewart), "We done the big one. . . . We killed a girl. . . . Murder one." Defendant Mitchell said in reply, "Yeah, we did, there's her car." (Referring to the Volkswagen.) Lanford asked Stewart for his car and weapons, but Stewart refused any assistance. Also Lanford tried to convince his brother-in-law that he had killed the girl and offered to take him to the Lincoln Academy site to prove it. Stewart declined to go and the defendants drove off alone. When they returned to Stewart's house about one hour later, they reported that the girl's body had been removed. Later that evening in the vicinity of Lincoln Academy (where Kathy's body was found) there was an explosion and the Volkswagen was observed burning.

The next day Mitchell, in the presence of Lanford, said that they had burned the Volkswagen; that the owner of the Volkswagen was dead; and that the girl who was killed on Crowder's Mountain the night before was the owner of the Volkswagen.

As a result of this conversation, defendants obtained a blue Datsun from Frances Mitchell (defendant Mitchell's sister) and returned to the home of Lanford's brother-in-law (Stewart) seeking weapons, but they had been moved to Lanford's father's house. While at the brother-

in-law's house, Lanford admitted having intercourse with Kathy, but said that it was not rape. Counsel for Lanford, on instructions from his client, did not cross-examine Stewart.

The evidence presented by defendant Mitchell tended to show the following: On 21 April 1974 he was in Atlanta with defendant Lanford. They were taking dope and drinking and planned to hitchhike to Gaston County. They observed a girl walking up the road and engaged her in conversation. She said that she had "done dope" before and wanted some more and that her automobile was out of gasoline. Defendant Lanford went to a filling station and got a can of gasoline. Later she directed them to a place to get dope, but no one was there. Thereupon she said that she had some in the dashboard. They smoked marijuana and drank some whiskey. Mitchell asked Kathy to take them to North Carolina. She agreed on the condition that they buy her some gasoline. She placed a telephone call to her mother before leaving. Mitchell stated that in addition to smoking "grass" and drinking some liquor on that day, he had also taken some THC and cocaine. He said he seduced Kathy on the way back to North Carolina. Upon arriving in Gaston County they went to the Lincoln Academy area and again had sexual intercourse. Mitchell then asked her to commit oral sex on him and she refused. Mitchell knocked her to the ground, grabbed her by the hair and stabbed her repeatedly. About this time, defendant Lanford came up from behind and grabbed him. He told Lanford to leave him alone and in a fit of anger threw Lanford to the ground, hitting him three or four times. Lanford got up and ran away. Just before leaving, Lanford said, "Don't cut me." Mitchell said that the next thing he remembers he was carrying the girl's dead body up through the woods. He was on dope and was "seeing things." He tied Kathy to a tree in a sitting position. Shortly thereafter, Mitchell told Lanford he had killed the girl. Lanford said, "I know you are crazy enough to kill me, but I don't believe you killed that girl." Later Mitchell said that he did not remember killing her, but he had blood all over him and she was dead. That night he went back and burned the car. Lanford was present. Mitchell said that he had sexual relations with Kathy, but that defendant Lanford did not

touch her and had nothing to do with the killing. Mitchell also denied conversations with others who had testified against him.

Defendant Mitchell, who had been convicted of traffic offenses, assault, fighting, larceny, and the larceny of an automobile, had escaped from the North Carolina Department of Corrections and had been at large for four months when this killing occurred.

Defendant Lanford offered no evidence.

Attorney General RUFUS L. EDMISTEN by Associate Attorney Robert W. Kaylor for the State.

ROBERT H. FORBES for Pinkney Thomas Mitchell, Jr. and ROBERT E. GAINES for Wallace Charles Lanford, Jr., representing defendant appellants.

COPELAND, Justice.

Defendants were represented by separate counsel and filed separate appeals. Some of the assignments of error are the same and some relate only to one defendant.

Our Court has held that where there are two indictments in which both defendants are charged with the same crimes, then they may be consolidated for trial in the discretion of the court. State v Combs, 200 N.C. 671, 674, 158 S.E. 252, 254 (1931). "The Court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. [Citations omitted.]" Id. at 674. G.S. 15-152; State v Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972); State v White, 256 N.C. 244, 123 S.E.2d 483 (1962).

Defendant Mitchell contends the consolidation was prejudicial to him because of the testimony of William Richard Stewart, the brother-in-law of defendant Lanford. A careful examination of the record indicates that Stewart testified as to substantially similar incriminating statements made by each defendant in the presence of one another. In essence, Mitchell adopted Lanford's admissions to Stewart.

Defendant Lanford contends that the consolidation was prejudicial against him because defendant Mitchell testified in his own behalf at the trial and attempted to mitigate the killing and reduce it to second-degree murder because of his use of drugs and intoxicants. Lanford contends that this especially hurt his case since he elected not to testify in his own behalf. There is absolutely nothing in the record to indicate that the trial judge in making his ruling on consolidation knew that Mitchell would take the witness stand. In any event, Mitchell had a right to testify if he wished and Lanford could cross-examine him. Moreover, it is difficult to understand how Lanford can contend that he was prejudiced by Mitchell testifying when in fact Mitchell admitted the killing and the burning of the vehicle and attempted by his testimony to exonerate Lanford in every way. It was proper and appropriate for the two defendants to be tried together and there is no merit to this assignment of error.

Defendants Lanford and Mitchell next contend that the court should have dismissed the cases against them as of nonsuit and for mistrial for the charges of first-degree murder at the close of the State's evidence and at the close of all the evidence. Lanford makes a similar contention with respect to the charge of felonious burning of personal property.

Upon a motion for nonsuit, the trial court must consider the evidence in the light most favorable to the State. The trial court is not concerned with the weight of the testimony, but only with whether the evidence, be it direct or circumstantial, supports sending the case to the jury. State v McNeil, 280 N.C. 159, 185 S.E.2d 156 (1971); State v Goines, 273 N.C. 509, 160 S.E.2d 469 (1968). Conflicts and discrepancies in the evidence should be resolved in the State's favor. State v Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975); State v McNeil, supra; State v Cutler, 271 N.C. 379, 156 S.E.2d 679 (1967).

In order to convict the defendant of first-degree murder, the State must satisfy the jury beyond a reasonable doubt of all the elements

thereof, to wit, an unlawful killing of a human being with malice and with a specific intent to kill and committed after premeditation and deliberation.

"Of course, ordinarily, it is not possible to prove premeditation and deliberation by direct evidence. Therefore, these elements of first degree murder must be established by proof of circumstances from which they may be inferred. [Citations omitted.] Among the circumstances to be considered by the jury in determining whether a killing was with premeditation and deliberation are: want of provocation on the part of the deceased; the conduct of the defendant before and after the killing; the use of grossly excessive force; or the dealing of lethal blows after the deceased has been felled. [Citations omitted.]" State v Buchanan, 287 N.C. 408, 420-21, 215 S.E.2d 80, 87-88 (1975). State v Van Landingham, 283 N.C. 589, 197 S.E.2d 539 (1973); State v Hamby and State v Chandler, 276 N.C. 674, 174 S.E.2d 385 (1970); State v Sanders, 276 N.C. 593, 174 S.E.2d 487 (1970); State v Walters, 275 N.C. 615, 170 S.E.2d 484 (1969); State v Faust, 254 N.C. 101, 118 S.E.2d 769 (1961).

An analysis of the facts of the case in relation to these factors reveals a want of provocation by the deceased - a sixteen-year-old girl. The conduct of defendants before and after the killing supported an inference of premeditation and deliberation as well as the other elements of the crimes charged. The State's evidence permits the following reasonable inferences: defendants abducted the victim and had sexual relations with her; defendants told Stewart that they had killed the victim; defendants later departed in the victim's automobile and burned it in order to destroy any evidence; and defendants secured another vehicle in which to leave Gaston County. The use of grossly excessive force was indicated when the deceased was found tied to a tree, gagged, and stabbed numerous times in vital areas of the body. In summation, there was plenary evidence as to both defendants from which to show premeditation and deliberation as well as the other elements of the crimes involved. This assignment of error is without merit and is overruled.

Defendant Mitchell contends that the trial court committed error in the charge to the jury. Counsel for Mitchell, with commendable frankness, states that none of the exceptions, in his opinion, would entitle Mitchell to a new trial. Counsel requests the court to review the charge. This has been done and we conclude that there was no error.

Defendant Mitchell contends the court erred in permitting the witness Shellnut to change his description of the defendants on voir dire. There was no voir dire of Shellnut and he did not identify defendants. There is no merit in this argument.

Defendant Mitchell also contends that it was improper for the court to receive evidence concerning the home life of the deceased, photographs of the area in which she lived and where she was seen with the defendants, and photographs of the deceased, the automobile, and its contents.

In connection with these assignments of error, counsel for the defendant concedes that none of these individually would entitle the defendant to a new trial, but should be considered reversible error when considered as a whole.

All of this evidence, save that of the home life of the victim, was competent and relevant to establish the identification of the victim, the ownership of the Volkswagen, and the identification of the general area where the crimes had their inception. The photographic evidence was introduced with limiting instructions for the purpose of illustrating the testimony of the witnesses. State v Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969). If the evidence pertaining to the home life of the deceased was error, then it was clearly harmless beyond a reasonable doubt. State v Jones, 280 N.C. 322, 185 S.E.2d 858 (1972); Chapman v California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). These assignments of error are overruled.

Defendant Mitchell also contends that admission of the testimony of the witness Stewart was prejudicial error. As stated earlier in the

discussion on consolidation, there is no merit in this related contention for the reasons there stated.

A further contention of Mitchell is that the failure of Lanford to testify caused the jury to have grave doubts concerning Mitchell's defense. This argument has no merit. The record indicates that Mitchell by his own testimony admitted the killing and the burning of the Volkswagen and attempted to excuse himself of murder in the first degree because of the use of drugs and intoxicating beverages.

Defendant Mitchell contends that he did not have sufficient mental capacity to form the necessary premeditation and deliberation. In this connection, the trial court properly charged the jury on the law relative to voluntary intoxication and voluntary use of drugs. It was properly left for the jury to determine whether Mitchell's mental condition was so affected by intoxication or drugs that he was rendered incapable of forming a deliberate and premeditated purpose to kill. State v Propst, 274 N.C. 62, 161 S.E.2d 560 (1968). This assignment of error is overruled.

Both defendants contend that the court erred by refusing to set the verdict aside as being against the greater weight of the evidence and refusing to declare a mistrial. These motions were addressed to the discretion of the trial court. That discretion was not abused. 3 Strong, N. C. Index 2d, Criminal Law, §§ 128, 132. As a matter of fact, we have fully considered this in the discussion on the motions for nonsuit. These assignments are without merit and are overruled.

The defendants have had a fair trial free from prejudicial error. Kathy was sent to her death in a vicious manner by these defendants. The case was ably prepared and presented by the district attorney and carefully and fairly tried by Judge Grist.

In the trial we find

NO ERROR.